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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

DOUGLAS KLYSE, Plaintiff and Appellant, v. REDWOOD TRUST DEED SERVICES, INC., Defendant and Respondent.	A130594 (Sonoma County Super. Ct. No. SCV245151)

Plaintiff Douglas Klyse sued Redwood Trust Deed Services, Inc. (Redwood) for negligence, breach of contract, and unfair competition, based on its having issued checks from a construction holdback account without ensuring that construction had actually occurred. The trial court granted summary judgment for Redwood.

Klyse asserts four arguments on appeal, the first procedural and the others substantive, that the trial court: (1) failed to state the evidence upon which it based its grant of summary judgment; (2) erroneously granted summary adjudication as to the negligence cause of action on the basis that Redwood owed no legal duty to Klyse and that it complied with its duty of care; (3) erroneously granted summary adjudication as to the breach of contract cause of action where Klyse and Redwood had an agreement including an implied term not to release funds without confirming construction; and (4) erroneously granted summary adjudication as to the unfair competition cause of action, where Klyse had presented evidence both that (a) Redwood engaged in unlawful

activity by violating licensing and other requirements of real estate and escrow laws and (b) Redwood's alleged unlawful violations of escrow laws caused Klyse damage.

We agree with Klyse's second and fourth arguments, concluding that it was error to grant summary adjudication of Klyse's negligence and unfair competition claims. We thus reverse the summary judgment. We affirm the summary adjudication of the contract cause of action

BACKGROUND

The General Facts

Analy Mortgage Center, Inc. (AMC) is a loan broker and solicits money from investors to provide funds for loans to borrowers. One of the people with whom it dealt in the past, and dealt here, is Klyse. Redwood is in the business of loan servicing and is licensed by the California Department of Real Estate as a real estate broker. Redwood is not licensed as an escrow agent or joint control agent by the California Department of Corporations. As will be seen, however, there was evidence that Redwood was in fact acting in such capacity here, a capacity regulated by statute.

In March 2006, AMC brokered a loan to Michael Page in the amount of $650,000, including $200,000 contributed by Klyse and approximately $225,000 by Charles Davis, who assigned his rights to Klyse. The loan included $150,000 toward the purchase of real property in Lake County and $500,000 for construction of a residence on the property. It was anticipated that the completed residence would have made the property worth at least $815,000. AMC was paid approximately $44,000 for its services in brokering the loan.

In March and April 2006, Klyse and Davis gave their respective portions of the construction loan funds to Redwood, which Redwood placed in a trust account. The parties disagree as to who hired Redwood: Redwood produced evidence that it was hired by AMC to service the loan; Klyse produced evidence that, in general, Redwood performs loan servicing for lenders and that lenders and not borrowers hire it. Indeed, Robert Cullen, Redwood's principal, admitted that it is "the lender who hires [us]."

After the purchase of the property, the balance of the loan proceeds were to be paid to Page, in increments, as construction on the property progressed. As noted, Redwood's licensed business is that of loan servicing, and loan servicing agents do not take deposits of loan principal in order to disburse it to a borrower. Notwithstanding that, Redwood, which had a long business relationship with AMC, agreed to manage the funds here, for which it was paid a total of $500. Redwood received the construction funds directly from the lenders, and deposited the funds into what it called a "Construction Holdback Account." And when Redwood took the funds from the lenders, it knew they were for the construction of improvements to the real property. It also knew that the improvements were imperative to ensure that the loan was properly secured and that the borrower was not entitled to the construction funds until after satisfying certain conditions.[1]

The funds in the construction holdback account were paid by checks written by Redwood to Page in varying amounts, through written draw requests from AMC to Redwood. The draw requests contained the following representation by AMC: "Pursuant to our agreement with the lender and borrower, I/We are authorized to make this Draw Request." The draw requests made no reference to construction progress or the purpose of the funds requested. From March 31 through August 1, 2006, Redwood paid out all $500,000 to Page—including a single payment of $300,000—without ever inquiring about construction. Despite the distribution of the funds, no significant construction took place. And the property was worth only $300,000 in the end.

One other background fact is that beginning in 1999, Klyse had through AMC lent money on several loans, some of which, like the subject loan, were construction loans. And in some of those loans, Klyse entered into a loan servicing agreement, some of which included a "Construction Addendum." The Construction Addendum provided in part that Redwood "has no responsibility for ascertaining the degree of completion,

[1] Klyse testified he had no specific expectation that Redwood would monitor the construction on the property, but did expect that someone would.

quality of construction, use of prior disbursed proceeds, identity of payees or any other aspects of the propriety of any disbursement; [Redwood's] function is limited to the administrative function of making disbursements in the manner directed by LENDER and BORROWER, or their agents." It also provided that Redwood "has no responsibility for the selection or monitoring of contractors, materialmen, construction methods, obtaining of governmental approvals, performing inspections or any other aspect of the construction process." No loan servicing agreement or Construction Addendum was signed by Klyse with respect to the loan in issue here.

The Proceedings Below

On May 20, 2009, Klyse filed a complaint against Redwood (and AMC) alleging that, despite distribution of all of the loan funds, the only construction of the residence actually completed by Page was of a foundation and a well, causing lenders to lose at least $450,000 following Page's default on the loan. The complaint alleged four causes of action, three of which were against Redwood: (1) the first, for negligence for distributing construction funds without ensuring that construction was taking place (count I), and negligence per se for acting as an unlicensed escrow agent or joint control agent in violation of Financial Code sections 17000 et seq.[2] (count II); (2) the third, for breach of contract for breach of an oral or implied agreement that it would ensure it was disbursing construction funds commensurate to the progress of construction; and (3) the fourth, for unfair competition for unlawfully acting as an unlicensed escrow agent or joint control agent, acting incompetently as such, and causing the investment to be undersecured.[3] Redwood answered the complaint on November 12, 2009.

On May 5, 2010, Klyse filed a motion for summary adjudication seeking a determination that: (1) Redwood owed Klyse (and Davis) a duty of care specifically

[2] All statutory references are to the Financial Code, unless otherwise indicated.

[3] Klyse asserted two claims against AMC: count I of the negligence cause of action, and breach of contract for breaching an oral agreement with the lenders that AMC would ensure the funds were disbursed commensurate with equivalent construction. AMC is not involved in this appeal, and the parties agree AMC is "an insolvent bankrupt" and that its available insurance was "inadequate" to cover the lenders' losses.

imposed by statute under section 17000 et seq. in the receipt and disbursement of the loan; and (2) Klyse was entitled to summary adjudication on the unfair competition cause of action as there were no dispute of material fact that would require a trial court to resolve the question of Redwood's duty to Klyse and Davis.

On August 10, 2010, the trial court issued a tentative ruling denying Klyse's summary adjudication motion, and after hearing the next day, adopted its tentative ruling. The order denying the motion for summary adjudication was finally filed on December 6, 2010, finding that "Redwood raises a triable issue as it appears Redwood's duty was to disburse the funds as instructed by [AMC] and Redwood assumed no duty to monitor or verify the satisfaction of the progress of the construction. Further, if Redwood was required to be licensed and was not, [p]laintiff fails to establish sufficient nexus between such licensing violation and [p]laintiff's injury. Facts 2, 7, 12; Redwood's Facts 4-11, 14-24."

Meanwhile, on June 10, 2010, Redwood filed a motion for summary judgment or, in the alternative, summary adjudication of issues, attacking all three causes of action against it. The motion argued that the negligence claims and unfair competition claim failed "as a matter of law," and that Redwood "did not breach any contract with Plaintiff." The motion was accompanied by a separate statement that listed 35 supposedly undisputed material facts and an appendix of evidence. Redwood's papers did not contain any document signed by Klyse in connection with the subject loan.

Klyse filed vigorous opposition to the motion, which included a declaration of expert witness John H. Moulton, who had over "48 years of experience in the banking, lending, mortgage banking, construction lending and mortgage servicing." Among other things, Moulton testified as follows:

"4. In my opinion, and based upon my training and experience, Redwood's conduct as a deed of trust servicing agent fell well below the standard of care imposed by the deed of trust (aka mortgage) servicing industry. Redwood asserts that its role with the loan at issue in this case was merely as a 'servicing agent.' A trust deed servicing agent is a licensed real estate broker or regulated financial institution and assists lenders with

the administration of the terms of the note and deed of trust, including, but not limited to, collection of payments after a loan is made and the necessary procedures related to a default of the borrower, up to and including conducting foreclosure proceedings.

"5. In this case, based upon my training and experience, in my opinion Redwood went well beyond the duties of a trust deed servicing agent when it took deposits of around $500,000 of the loan principal from the lenders, held it in 'construction holdback' account and disbursed it incrementally to the borrower. In that role, Redwood performed the function of an escrow 'joint control agent' disbursing a construction loan.

"6. To perform this function, Redwood was required to be licensed as an escrow or joint control agent pursuant to the Escrow Laws. It was not.

"7. Based upon my training and experience, in my opinion escrow agents are required for the deposit and disbursement of construction loans brokered by a mortgage broker. When making such disbursements, the industry custom and practice supported by the Escrow Laws require that they be made either pursuant to written instructions from the escrow agent's principal—the lender—only, or after verifying that construction has progressed in accordance with an agreement from the escrow agent[']s principal.

"8. Based upon my training and experience, in my opinion the requirements placed upon escrow agents act as safeguards to ensure that construction loans are not disbursed without sufficient, comparative collateral being constructed on the securing property. Redwood, in this case, in addition to being an unlicensed escrow agent did not comply with those requirements of the Escrow Laws. Based upon my training, education and experience, in my opinion had Redwood complied with those requirements it would not have released the entire $500,000 construction loan to the borrower without any significant construction taking place and plaintiff would not have been damaged."

The motion came on for hearing on September 1, 2010, at which the court heard argument, at the conclusion of which the court observed that "[E]verything I've looked at convinces the court that Redwood's obligation was to do exactly what [AMC] told them to do. [¶] . . . [¶] The court thinks that . . . the function of Redwood was to hold the

money, wait until they're told by [AMC] what to do with it, and then do what they were told."

The trial court granted Redwood summary judgment in an order filed September 20, 2010. Eschewing any reference to the evidence submitted by Klyse—including, not incidentally, Moulton's expert testimony—the court found the material facts established as a matter of law that Redwood owed no duty to Klyse to monitor construction on the subject property. Specifically, the court found "that there is no triable issue of material fact, and that Redwood is entitled to judgment as a matter of law, based upon the following: [¶] . . . [¶]

"3. **Negligence:** As to the negligence cause of action, the material facts are undisputed and establish as a matter of law that Redwood owed no duty to [p]laintiff [Klyse] to monitor construction on the property that was the subject of the loan ('the subject property'). [¶] Redwood was hired to service the loan that [AMC] brokered between plaintiff and the other private lenders, and the borrower, Michael Page. In addition, Redwood was paid $500 to manage the construction holdback account. Redwood's responsibilities as to the construction holdback account were limited to issuing checks to Page pursuant to written instructions from AMC that came in the form of draw requests. (Undisputed Facts 6, 11, 12, 13, 16.) The draw requests expressly stated that they were made on behalf of the lenders and the borrower. As to the construction holdback account, Redwood was acting under the direct supervision of and pursuant to the express written instructions of AMC. (Undisputed Facts 14, 17.) AMC was supposed to monitor the status of the construction prior to issuing the draw requests to Redwood. (Undisputed Facts 20.)

"In opposition to the motion, plaintiff submitted no evidence of an agreement between (1) [him] and Redwood, or (2) AMC and Redwood that provided that Redwood would monitor the construction on the subject property. Plaintiff submitted no evidence that Redwood took any action with regard to the construction holdback account except under the direct supervision of AMC. Plaintiff submitted no evidence that Redwood took

any action with regard to the construction holdback account except pursuant to the written instructions (draw requests) sent by AMC on behalf of the lenders.

"Based on these undisputed facts, Redwood's duty of care as it relates to the construction holdback account was limited to issuing checks pursuant to the written draw requests from AMC. Redwood was not required to be licensed as a joint control agent under the circumstances which obviated any statutory duty on the part of Redwood to monitor the construction on the subject property. See Fin. Code § 17006(b). The undisputed evidence establishes that Redwood did not breach that duty of care as it relates to the construction holdback account. Further, even if Redwood owed plaintiff a duty to comply with Financial Code § 17422, it complied with that duty because it acted pursuant to the express written instructions of AMC which came in the form of the written draw requests. (Undisputed Facts 13, 14, 15.)

"4. **Breach of Contract:** Plaintiff's cause of action for breach of contract fails as a matter of law as to Redwood. Redwood submitted evidence establishing that it did not enter into a written or oral contract with plaintiff for Redwood to monitor construction on the subject property. (Undisputed Facts 18, 29, 30, 32-35.) In opposition, plaintiff failed to submit evidence of any written or oral agreement between Redwood and plaintiff.

"Finally, plaintiff submitted no evidence of an implied agreement through which Redwood agreed to monitor construction on the subject property. (Undisputed Fact 32.)

"5. **Business & Professions Code § 17200 Cause of Action:** The motion is granted as to the cause of action brought pursuant to Business & Professions Code § 17200. Plaintiff failed to establish that Redwood engaged in any unlawful business practices. As set forth above, Redwood was not required to comply with the provisions of the Financial Code relating to escrow agents or joint control agents and, even if it were, Redwood complied with Financial Code § 17422. In addition, there is no evidence that the failure of Redwood to be licensed as an escrow agent, even if required, caused any damage or loss to Plaintiff."

An amended judgment in favor of Redwood and awarding costs was filed on December 6, 2010. As noted, that same day the court filed its order denying Klyse's motion for summary adjudication.

On December 10, 2010, Klyse filed a notice of appeal, appealing from the judgment and the order denying his motion for summary adjudication.[4]

DISCUSSION

Summary Judgment and the Standard of Review

We collected and confirmed the governing law in *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 253–254, as follows:

"Code of Civil Procedure section 437c, subdivision (c) provides that summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) As applicable here, moving defendants can meet their burden by demonstrating that 'a cause of action has no merit,' which they can do by showing that '[o]ne or more elements of the cause of action cannot be separately established . . . .' (§ 437c, subd. (*o*)(1); see also *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 486-487.) Once defendants meet this burden, the burden shifts to plaintiff to show the existence of a triable issue of material fact. (§ 437c, subd. (p)(2).)

"On appeal '[w]e review a grant of summary judgment de novo; we must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. [Citations.]' (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) Put another way, we exercise our independent judgment, and decide

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[4] Though Klyse appealed the order denying his motion for summary adjudication, he makes no adequate argument as to this claim, simply concluding that because Redwood's motion for summary judgment was erroneously granted, his motion for summary adjudication should have been granted. " '[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived and pass it without consideration. [Citations.]' (9 Witkin, Cal. Procedure [(5th ed. 2008) Appeal, § 701, pp. 769-770.)" (*Mission Shores Assn. v. Pheil* (2008) 166 Cal.App.4th 789, 796.) In light of this, we hold that Klyse has waived any claim concerning his motion for summary adjudication.

whether undisputed facts have been established that negate plaintiff's claims. (*Romano v. Rockwell Internat., Inc., supra,* 14 Cal.4th at p. 487.) As we put it in *Fisherman's Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 320: '[W]e exercise an independent review to determine if the defendant moving for summary judgment met its burden of establishing a complete defense or of negating each of the plaintiff's theories and establishing that the action was without merit.' (Accord, *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972.)

"But other principles guide us as well, including that '[w]e accept as true the facts . . . in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them.' (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 67.) And we must ' "view the evidence in the light most favorable to plaintiff[] as the losing part[y]" and "liberally construe plaintiff['s] evidentiary submissions and strictly scrutinize defendant['s] own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff['s] favor." ' (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 96–97.)"

Two other principles are apt: (1) "The presence of inferences supporting a judgment in favor of plaintiff is sufficient to defeat a summary judgment in favor of defendant" (*Hulett v. Farmers Ins. Exchange* (1992) 10 Cal.App.4th 1051, 1060); and (2) any doubts as to the propriety of granting summary judgment must be resolved in favor of Klyse. (*Laabs v. Southern California Edison Co*. (2009) 175 Cal.App.4th 1260, 1268; *Robert T. Miner, M.D., Inc. v. Tustin Ave. Investors* (2004) 116 Cal.App.4th 264, 270.)

The Court's Order Was Adequate

Code of Civil Procedure section 437c, subdivision (g), requires the court to "specify the reasons for its determination" that there is no triable issue of material fact. "The order shall specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists." (*Ibid.*) Klyse's first argument is a procedural one, that the trial court failed to meet the above requirement, contending the court failed to state the findings upon which it based

its grant of summary judgment and that the order at issue did not cite to any evidence. We disagree.

The court's statement here adequately explained the bases upon which it found there was no triable issue of material fact. The court explained its reasoning with respect to each cause of action, and stated the facts it relied upon in support. While the order did not specifically reference the evidence presented in terms of the various declarations, depositions, responses to requests for admissions or the like, it did reference by number Redwood's undisputed statement of material facts (and presumably incorporating the evidence cited in support thereof, as well as Klyse's response thereto.) This was adequate.

Carnes v. Superior Court (2005) 126 Cal.App.4th 688, the case relied on by Klyse, is not to the contrary. There, the court did not make a tentative ruling before the hearing, and its written ruling simply granted the motion for summary judgment and ordered the defendants " 'to prepare the form of this order and include and [*sic*] all findings necessary to support this order.' " The defendants prepared a 14-page proposed order including rulings of the parties evidentiary objections, on which the judge never expressed an opinion. (*Id.* at pp. 691-692.) The appellate court held the court's action improper in granting the motion without specifying *any* of the reasons for doing so, and in directing counsel for the prevailing party to prepare an order including all necessary findings, "without telling the prevailing party what any of those 'findings' should be." (*Id.* at pp. 692-693.) Despite its disapproval of the process, however, the court concluded it was not compelled to reverse the judgment where the court adopted the order of counsel as its own by signing the order prepared by counsel and that order adequately stated the court's "reasons for its determination" as required by Code of Civil Procedure section 437c, subdivision (g). (*Id.* at p. 693.) More importantly, the court held that, because review is de novo and reviews the ruling and not the rationale of the trial court, "[t]he sole question properly before us on review of the summary judgment is whether the judge reached the right *result*—i.e., entry of judgment in favor of [the

defendant]-whatever path he might have taken to get there, and we decide that question independently of the trial court. [Citation.]" (*Id.* at p. 694, fn. omitted.)

Unlike the trial judge in *Carnes*, the court here addressed the issues in a tentative ruling, and also at the hearing on the motion. It also stated its reasons at the hearing,[5] going on to state that it intended to stand on the tentative ruling, "amplified by the discussions we've had during the proceeding here." The order was not inadequate.

We thus turn to the substantive questions, whether the court properly granted summary adjudication against all three of Klyse's claims—and thus summary judgment in favor of Redwood.

Summary Adjudication on the Negligence Cause of Action Was Improper

Klyse's first cause of action, alleged in two counts, was for negligence, as to which the court granted summary adjudication. Klyse contends the trial court erred in determining Redwood owed no legal duty to Klyse (and Davis) and that it complied with its duty of care as to disbursements it made from the construction holdback account by acting pursuant to the express written instructions of AMC. Klyse alleged below, and contends here, that Redwood owed a duty of care derived from two sources: a general common law duty of care arising from its professional services in managing the holdback account and statutory duties imposed by real estate and escrow laws and arising from its actions as a "joint control agent" in connection with the holdback account. We agree on both counts.

Our colleagues in Division One recently confirmed the applicable law, in *Lawson v. Safeway* (2010) 191 Cal.App.4th 400, 408-409:

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[5] The court explained, in part: "[B]y the agreement between—the role they [Redwood] were playing is that . . . there were specific instructions that—Redwood either had to go and check on progress or rely upon specific written instructions. And when the written instruction is, send $300,000 to the borrower, then I think Redwood would have a duty to do that because they're responding to the written instructions of [AMC]. "I really see the claim is a problem for AMC. I think everybody acknowledges they have— it would appear to all that they have liability. I think the president as much as admits that. The question is, does Redwood have liability. And everything I've looked at convinces the court that Redwood's obligation was to do exactly what [AMC] told them to do."

" 'The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion. [Citations.] Whether this essential prerequisite to a negligence cause of action has been satisfied in a particular case is a question of law to be resolved by the court. [Citation.] (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397 (*Bily*).) We are mindful that the concept of duty is ' "a shorthand expression of a conclusion, rather than an aid to analysis in itself," ' and constitutes 'the result of all the policy considerations leading the law to say that a particular plaintiff is entitled to protection.' (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 6, p. 49.) We now consider those policy factors.

" 'In this state, the general rule is that all persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct. (*Rowland* [v. *Christian* (1968) 69 Cal.2d 108 at p.] 112 . . . ; see Civ. Code, § 1714.)' (*Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1077.) '*Rowland* enumerates a number of considerations . . . that have been taken into account by courts in various contexts to determine whether a departure from the general rule is appropriate . . . ." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6 (*Ballard*).) The factors to be balanced under *Rowland* are: 'the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.' (*Rowland, supra,* 69 Cal.2d at p. 113.)

" '[T]he chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk . . . .' (*Dillon* [v. *Legg* (1968)] 68 Cal.2d 728 at p. 740.)"[6]

Applying those factors, especially the "chief element," here, it cannot be denied that release of the funds without assurance that the work was done posed a foreseeable risk to Klyse. Beyond that, it appears that all but one of the other *Rowland* factors militate in favor of recognizing a duty in this case, with the only factor possibly lacking being "moral blame." Klyse was unquestionably injured, with Redwood's conduct clearly the proximate cause. Recognition of a duty would help prevent future harms, perhaps not least by persuading Redwood (or others like it) not to engage in activity for

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[6] While settled law states that duty is a question of law, there is nevertheless a factual component involved, recognized, for example, by statements such as " '[d]uty' is merely a conclusory expression used when the sum total of policy considerations lead a court to say that the particular plaintiff is entitled to protection. ' " (*White v. Southern Cal. Edison Co.* (1994) 25 Cal.App.4th, 442, 447.) Or, as our Presiding Justice has put it:

"Legal rules are no more than conditional statements referring to supposed facts. The Restatement Second of Torts declares, for example, that the word 'duty' is used 'to denote the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury sustained by such other, of which the actor's conduct is a legal cause.' (Rest.2d Torts, § 4, p. 7.) The purely legal rule, which defines the 'particular manner' in which an actor must ordinarily conduct himself, does not, however, always fully determine the existence of a duty. Whether the duty exists depends in part upon whether the actor conducted himself in the appropriate manner, which is, of course, a factual question. Thus, as has been stated, '[t]he duty issue frequently poses questions of the kind usually given to the jury. Under the prevailing rule duty to use due care is bounded by the foreseeable range of danger. Reasonable foreseeability of harm is the very prototype of the question a jury must pass on in particularizing the standard of conduct in the case before it.' (3 Harper et al., The Law of Torts, *supra*, § 18.8, p. 744.) Moreover, '. . . the question of foreseeability always involves more than the determination of simple facts—i.e., what the parties did or did not do, and what the surrounding circumstances were. It also involves a determination of what the parties *should have perceived* under those circumstances, i.e., whether the reasonably prudent person in the shoes of [the] party would have recognized unreasonable danger *to* the plaintiff *from* the source of harm or hazard that befell him.' " (*Id.*, at p. 747, citing Rest.2d Torts, § 323C.)" (*Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 297-298, dis. opn. of Kline, P.J.)

which it was not suited or licensed—or qualified. And as to insurance, Redwood's brief says it all: it was "properly insured for this loss."

We thus conclude that any determination that Redwood owed no duty or that its duty was met was error. Thus the summary adjudication on the negligence cause of action must be reversed, as it was in *Laabs v. Southern California Edison Co., supra*, 175 Cal.App.4th 1260, 1269 where the Court of Appeal held as follows: "We note, however, that we do *not* hold that SCE owed Laabs a duty of care as a matter of law; rather, we hold that triable issues of fact exist as to the relevant considerations underlying duty in this case, and that SCE failed to establish that it was entitled to judgment as a matter of law. While we recognize that the issue of duty is a matter for the trial court, it is nonetheless a factually oriented inquiry. As stated in *Burger v. Pond* (1990) 224 Cal.App.3d 597, 603, ' "Foreseeability" and "policy considerations" are not determined in a vacuum, but rather depend . . . upon the particular circumstances in which the purported wrongful conduct occurred.' "

Here, too, there is a triable issue of fact as to duty under the common law. Likewise under the statutes.

As quoted above, Moulton's declaration showed that there was a triable issue of fact that in managing the construction holdback account, Redwood was acting as a "joint control agent." As such, Redwood would be subject to the duties attendant to that role—duties the Legislature specifically enacted almost 50 years ago "because the public recently has been endangered by the improper conduct of such agents in the handling of funds entrusted to their care."

Klyse asserts that Redwood owed duties of care arising from statutes, primarily relying upon sections 17003, 17005.1, 17005.6, and 17422. We agree, and conclude that there is also a triable issue of material fact whether Redwood failed to comply with various statutory requirements. For example:

Financial Code section 17422 provides as follows: "A joint control agent, unless acting pursuant to written instructions of his principals, shall not disburse funds for the payment of the cost of labor, materials, services, permits, fees, or other items of expense

incurred in the construction of improvements upon real property until such time as he determines that the person furnishing such labor, materials, services, permits, fees, or other items has substantially complied with the specifications contained in the control agreement." Acting as a joint control agent, Redwood should have confirmed construction prior to making disbursements. It did not.

As to this, Redwood argues that it complied with the requirement, apparently as a matter of law, in relying upon the draw requests from AMC, and thus pursuant to "written instructions of [its] principals." (§ 17422.) As noted, however, it was Klyse's money Redwood disbursed, and the instructions could only come from Klyse. (See Cal. Code Regs, tit. 10 § 1738.5 ["The principals to the transaction are the buyer and seller or the borrower and lender."].) In any event, Redwood produced no evidence of agency, no agreement Klyse had with anyone, let alone an agency agreement. At the very least, a triable issue of material fact exists in this regard.

A joint control agent must be licensed under the escrow laws in order to disburse this loan. (Fin. Code, §§ 17003, 17005.1, 17200.) Redwood was not.

Klyse also contends that Redwood failed to comply with various statutory requirements in Business and Professions Code section 10238, subdivision (h), as follows:

1. "An independent neutral third-party escrow holder is used for all deposits and disbursements." (subd. (h)(4)(A).)

2. "A comprehensive, detailed, draw schedule is used to ensure proper and timely disbursements to allow for completion of the project." (subd. (h)(4)(C).)

3. "The disbursement draws from the escrow account are based on verification from an independent qualified person who certified that the work completed to date meets the related codes and standards and that the draws were made in accordance with the construction contract and draw schedule. For purposes of this subparagraph, 'independent qualified person' means a person who is not an employee, agent, or affiliate of the broker and who is a licensed architect, general contractor, structural engineer, or

active local government building inspector acting in his or her official capacity." (subd. (h)(4)(D).)[7] There are triable issues whether these sections, too, were violated.[8]

The purpose of disbursing a construction loan incrementally is to protect the value of the securing property by ensuring that it has sufficient value before disbursing more loan funds to the borrower. The escrow or joint control agent is the "safeguard" to ensure this result. (Bus. & Prof. Code, § 10238, subds. (h)(4)(A) & (C).) Redwood took no steps to obtain any information on the status of the construction prior to paying Page from the construction holdback account. Redwood violated the statutes. Redwood could be liable to Klyse. "When a legislative provision, embodying a public policy, is enacted for the protection of a particular class of persons, its violation may give rise to civil liability to an injured plantiff who is a member of the class." (5 Witkin, *Summary of Cal. Law, supra*, Torts, § 10(c), p. 54.)

Like Redwood, other professionals have acted outside of—or beyond—their normal function, the function for which he, she, or it was in fact licensed. Doing so, they faced possible liability. Illustrative is *Wasmann v. Seidenberg* (1988) 202 Cal.App.3d 752, 756-757, where an attorney was acting under the terms of a property division in a marriage dissolution. Reversing an order sustaining a demurrer, the Court of Appeal held

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[7] Redwood admits that it was "acting pursuant to written instructions from AMC to disburse the funds," which would appear to be a violation of the requirement that the verification of construction not come from AMC, but from a licensed architect, general contractor, structural engineer, etc.

[8] In response, Redwood relies on subdivision (a) of section 17006, which exempts from the licensing requirements and the provisions of the escrow laws generally, "[a]ny broker licensed by the Real Estate Commissioner while performing acts in the course of or incidental to a real estate transaction in which the broker is an agent or a party to the transaction and in which the broker is performing an act for which a real estate license is required." (§17006, subd. (a)(4).) However, section 17006, subdivision (b) limits the exemption provided by subdivision (a)(4) for licensed brokers, providing that the exemption is "personal to the persons listed, and those persons *shall not delegate any duties other than duties performed under the direct supervision of those persons. . . .*" (Italics added.)

that the attorney could be liable for acting as an escrow holder, and allowing recordation of deed before money due was deposited in escrow.

Redwood's fundamental position—and the position adopted by the trial court—was that its sole responsibility was to do what AMC asked it to do. In other words, that it followed its claimed contractual obligation. We have two observations.

First, as Redwood argued below, and the discussion in the next section confirms, Redwood had no contract *with Klyse.* Given that, we fail to see how Redwood's allegedly meeting some contractual obligation with some third party can abrogate its duty to Klyse.

Even assuming some contract could be in play here, any such contract would not necessarily do away with possible tort liability. As our Supreme Court confirmed 30 years ago: "Numerous decisions decided in the 80 years since *Sloane* [*v. Southern Cal. Ry. Co.* (1896) 111 Cal. 668] confirm that ' "it [is] well established in this state that if the cause of action arises from a breach of a promise set forth in the contract, the action is ex contractu, *but if it arises from a breach of duty growing out of the contract it is ex delicto*" ' (Italics added) [¶] . . . [¶] '[Whereas] [c]ontract actions are created to protect the interest in having promises performed, tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties . . . .' [Citation.]" (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 175-176.) To this same effect, see *North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 774.

We close the discussion on the negligence claim with a brief mention of an issue we do not address, but one that will undoubtedly arise when the matter resumes below: the effect of the Construction Addendum. As noted above, the Construction Addendum attempted to shield Redwood from liability in connection with its disbursement of loan proceeds to the borrower. As also noted, Klyse did not sign any addendum in connection with the loan involved here. However, Davis, Klyse's assignor, did sign such an addendum, which may have an impact on Klyse's claim to the extent it based on Davis's

contribution to the loan. We say may, because Klyse argues that such Construction Addendum is illegal as violative of public policy. That issue, however, was not fully briefed and is not necessary to our decision. It is thus an issue we do not decide, but leave for another day.

Summary Adjudication of the Breach of Contract Claim Was Proper

Klyse next contends that summary adjudication on his breach of contract cause of action was improper as he and Redwood had an implied agreement as to the construction holdback account that included an implied term that Redwood would not release funds without ensuring that the construction was progressing in proportion to the funds already disbursed. He argues this obligation was implied in Redwood's agreement with Klyse, Davis, and other lenders, by the parties' actions, and by contract law as an obligation of good faith and fair dealing implied in every California contract. We are not persuaded.

Klyse's breach of contract cause of action against Redwood alleged an oral or implied contract as follows: "Plaintiff and the other investors had an oral or implied agreement with defendant Redwood that Plaintiff and the other investors would deposit their investment funds in the Loan with Defendant Redwood and Defendant Redwood would then distribute the Loan incrementally as the construction on the property by Page progressed. Plaintiff alleges that this agreement included ensuring that the funds would not be distributed without ensuring that the construction was progressing in proportion to the funds already disbursed." However, no evidence of any such oral or written contract was presented, neither in connection with either Redwood's servicing of the loan nor the management of the construction holdback account.

As to the alleged "implied agreement," the court properly concluded that no evidence was presented that there was an implied agreement by Redwood to monitor construction or to ensure it was monitored before disbursing money at AMC's direction. It is undisputed that in addition to servicing the loan, Redwood agreed to manage the construction holdback account. It is also undisputed, however, that Redwood never expressly agreed to monitor construction on the site as part of managing that account. Klyse did not testify that he expected Redwood to monitor construction, only that

monitoring would be done by *someone.* This, we conclude, does not raise a triable issue of a contract.

Klyse argues that his breach of contract cause of action necessarily encompassed a cause of action for breach of the covenant of good faith and fair dealing that imposed upon Redwood an obligation to ensure that construction was occurring before disbursing loan funds. This contention fails, both procedurally and substantively.

The procedural problem with this claim is that Klyse never pleaded a cause of action for breach of the implied covenant. "[I]t is well established that 'the pleadings set the boundaries of the issues to be resolved at summary judgment.' (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648.) Accordingly, '[a] "plaintiff cannot bring up new, unpleaded issues in his or her opposing papers. [Citation.]" [Citations.] A summary judgment or summary adjudication motion that is otherwise sufficient "cannot be successfully resisted by counterdeclarations which create immaterial factual conflicts outside the scope of the pleadings; counterdeclarations are no substitute for amended pleadings." [Citation.] Thus, a plaintiff wishing "to rely upon unpleaded theories to defeat summary judgment" must move to amend the complaint before the hearing.' [Citation.]" (*Nein v. HostPro, Inc.* (2009) 174 Cal.App.4th 833, 851.)

Substantively, we disagree that Klyse's cause of action for breach of contract *necessarily* included a cause of action for breach of the implied covenant of good faith and fair dealing. "Every contract contains an implied covenant of good faith and fair dealing providing that no party to the contract will do anything that would deprive another party of the benefits of the contract. [Citations.] The implied covenant protects the reasonable expectations of the contracting parties based on their mutual promises. [Citations.] The scope of conduct prohibited by the implied covenant depends on the purposes and express terms of the contract. [Citation.] Although breach of the implied covenant often is pleaded as a separate count, *a breach of the implied covenant is necessarily a breach of contract.*" (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885, fn. omitted, italics added.)

Although a breach of the implied covenant will always result in a breach of the contract, "breach of a consensual (i.e., an express or implied-in-fact) contract term *will not necessarily constitute a breach of the covenant*." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1394, italics added.)

Further, breach of the implied covenant of good faith and fair dealing involves something beyond breach of the contractual duty itself. "Thus, allegations which assert such a claim must show that the conduct of the defendant, whether or not it also constitutes a breach of a consensual contract term, demonstrates a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement. Just what conduct will meet these criteria must be determined on a case by case basis and will depend on the contractual purposes and reasonably justified expectations of the parties. [¶] If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated." (*Careau & Co. v. Security Pacific Business Credit, Inc., supra,* at p. 1395.) "The covenant thus cannot ' "be endowed with an existence independent of its contractual underpinnings." ' [Citations.] *It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.*" (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 349-350, italics added; 3 Witkin, Summary of Cal. Law, *supra*, Agency & Employment, § 272, p. 358 [implied covenant claim alleging a breach of obligations beyond the agreement's actual terms, is invalid].)

Klyse did not allege any actions going beyond those he claimed constituted a breach of contract, and certainly none constituting the "conscious and deliberate act" required to state a cause of action for breach of the implied covenant. Summary adjudication was properly granted on Klyse's breach of contract claim.

Business and Professions Code Section 17200

Klyse's final argument is that the trial court erred in granting summary adjudication as to his unfair competition (UCL) cause of action, in essence determining that he had failed to establish that Redwood engaged in any unlawful business practices because of the failure of his negligence claims. We agree.

"[U]nfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code." (Bus. & Prof. Code, § 17200.)

Here, given Moulton's testimony, there is at the least a triable issue of fact that Redwood engaged in an unlawful activity by violating the licensing and other requirements of the escrow laws. Indeed, as a leading commentator describes it, "A person who practices a business or profession that requires a license from the state may be liable for unfair competition if he or she does not have a license." (2 Miller & Star, California Real Estate (3d ed. 2000) Regulation of the Real Estate Industry, § 4:1, p. 5; see also *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594 [selling insurance without a license is an unlawful activity actionable under the UCL].)

Not only did Redwood act unlawfully because it did not have a required license, it also violated other escrow laws, such as section 17422, which specifically applies to construction loans. Those violations constitute further unlawful business practices actionable under the UCL.

It is true, as Redwood contended, that Klyse must show that he was injured and lost money as a result of Redwood's unlawful activity. (Bus. & Prof. Code, § 17204.) But the "causation" element of an unfair competition cause of action is actually a standing requirement imposed by Proposition 64 to cure abuses by attorneys bringing such claims without any client, or with a client who had not actually been harmed by the claimed unfair business practice. (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 228.) To prevent such claims, Proposition 64's amendment requires that a plaintiff suffer an "injury in fact and has lost money" and that there be "a

causal connection between the harm suffered and the unlawful business activity." (*Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1097, 1099.)

Redwood does not dispute that Klyse suffered "an injury in fact and has lost money." And Redwood does not argue that Klyse and Davis would have suffered the same harm whether or not Redwood complied with the escrow laws—public protection laws that are there to prevent the exact harm that Klyse suffered here. (See *Escrow Institute of Cal. v. Pierno* (1972) 24 Cal.App.3d 356, 366 ["the purpose of protecting the public from unfair, fraudulent and incompetent service in the handling of escrows."].)

DISPOSITION

The summary judgment is reversed. The summary adjudication of the third cause of action, for breach of contract, is affirmed. Each side shall bear its costs on appeal.

_____
Richman, J.

We concur:

_____
Kline, P.J.

_____
Haerle, J.